



**BILLING CODE: 8070-01-P**

**FEDERAL HOUSING FINANCE AGENCY**

**12 CFR Part 1260**

**RIN 2590-AA35**

**Information Sharing Among Federal Home Loan Banks**

**AGENCY:** Federal Housing Finance Agency.

**ACTION:** Final Rule.

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**SUMMARY:** Section 1207 of the Housing and Economic Recovery Act of 2008 (HERA) amended the Federal Home Loan Bank Act (Bank Act) to add a new section 20A, which requires the Federal Housing Finance Agency (FHFA) to make available to each Federal Home Loan Bank (Bank) information relating to the financial condition of all other Banks. Section 20A also requires FHFA to promulgate regulations to facilitate the sharing of such information among the Banks. This final rule implements the provisions of section 20A of the Bank Act.

**DATES:** The final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Eric M. Raudenbush, Assistant General Counsel, Office of General Counsel, [Eric.Raudenbush@fhfa.gov](mailto:Eric.Raudenbush@fhfa.gov), (202) 649-3084; or Jonathan Curtis, Financial Analyst, Office of Program Support, Division of Bank Regulation, [Jonathan.Curtis@fhfa.gov](mailto:Jonathan.Curtis@fhfa.gov), (202) 649-3321 (these are not a toll-free numbers), Federal Housing Finance Agency, 400 Seventh Street, SW., Washington, DC

20024. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877-8339.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

#### **A. The Federal Home Loan Bank System**

The Federal Home Loan Bank System (Bank System) consists of twelve Banks and the Office of Finance (OF). The Banks are wholesale financial institutions organized under the Bank Act.<sup>1</sup> The Banks are cooperatives; only members of a Bank may purchase its capital stock, and only members or certain eligible housing associates (such as state housing finance agencies) may obtain access to secured loans, known as advances, or other products provided by a Bank.<sup>2</sup> Each Bank is managed by its own board of directors and serves the public interest by enhancing the availability of residential mortgage and community lending credit through its member institutions.<sup>3</sup> Any eligible institution (generally a federally insured depository institution or state-regulated insurance company) may become a member of a Bank if it satisfies certain criteria and purchases a specified amount of the Bank's capital stock.<sup>4</sup>

#### **B. Banks' Joint and Several Liability and Disclosure Requirements on COs**

The Banks fund their operations principally through the issuance of consolidated obligations (COs), which are debt instruments issued on behalf of the Banks by the OF, a

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<sup>1</sup> See 12 U.S.C. 1423, 1432(a).

<sup>2</sup> See 12 U.S.C. 1426(a)(4), 1430(a), 1430b.

<sup>3</sup> See 12 U.S.C. 1427.

<sup>4</sup> See 12 U.S.C. 1424; 12 CFR part 1263.

joint office of the Banks, pursuant to section 11 of the Bank Act,<sup>5</sup> and part 1270 of the regulations of FHFA.<sup>6</sup> Under these regulations, the COs may be issued only through OF as agent for the Banks, and the Banks are jointly and severally liable for the timely payment of principal and interest on all COs when due.<sup>7</sup> Accordingly, even when COs are issued with one Bank being the primary obligor, the ultimate liability for the timely payment of principal and interest thereon remains with all of the Banks collectively, which creates a need for each Bank to be able to assess the financial condition of the other Banks.

Although the COs themselves are not registered securities under the federal securities laws, the Federal Housing Finance Board (Finance Board)<sup>8</sup> adopted regulations in 2004 requiring each Bank to register a class of its common stock (which is issued only to its member institutions) with the Securities and Exchange Commission (SEC) under section 12(g) of the Securities Exchange Act of 1934 (1934 Act).<sup>9</sup> Each Bank subsequently registered a class of its common stock with the SEC in compliance with that regulation. Separately, HERA included a provision requiring the Banks to register their common stock under section 12(g) of the 1934 Act, and to maintain that registration.<sup>10</sup>

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<sup>5</sup> 12 U.S.C. 1431.

<sup>6</sup> 12 CFR part 1270.

<sup>7</sup> See 12 CFR 1270.4(a), 1270.10(a).

<sup>8</sup> The Federal Housing Finance Board was the regulator of the Bank System from 1989 through 2008. HERA, which abolished the Finance Board and established FHFA, provides that all regulations of the Finance Board shall remain in effect and shall be enforceable by the Director of FHFA until modified, terminated, set aside or superseded by the Director. See Pub. L. No. 110-289, section 1312, 122 Stat. 2798 (2008).

<sup>9</sup> 15 U.S.C. 781(g). See 69 FR 38811 (June 29, 2004), codified at 12 CFR part 998, repealed, 78 FR 15869 (March 13, 2013).

<sup>10</sup> See 15 U.S.C. 780o(b).

Accordingly, each Bank remains subject to the periodic disclosure requirements established under the 1934 Act, as interpreted and administered by the SEC.

#### C. New Statutory Provision Requiring the Sharing of Bank Information

Section 1207 of HERA added a new section 20A to the Bank Act that requires FHFA to make available to each Bank such reports, records, or other information as may be available, relating to the condition of any other Bank in order to enable each Bank to evaluate the financial condition of the other Banks and the Bank System as a whole.<sup>11</sup> The underlying objective for that requirement is to better enable each Bank to assess the likelihood that it may be required to make payments on behalf of another Bank under its joint and several liability on the COs, as well as to comply with disclosure obligations under the 1934 Act regarding its potential joint and several liability.<sup>12</sup> Section 20A further requires FHFA to promulgate regulations to facilitate the sharing of such financial information among the Banks.<sup>13</sup> Section 20A permits a Bank to request that FHFA determine that particular information that may otherwise be made available is “proprietary” (a term that is not defined in the Bank Act) and that the public interest requires that such information not be shared.<sup>14</sup> Finally, section 20A provides that it does not affect the obligations of the Banks under the 1934 Act and related regulations of the SEC, and that the sharing of Bank information thereunder shall not cause FHFA to waive any privilege applicable to the shared information.<sup>15</sup>

#### D. The Proposed Rules

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<sup>11</sup> See 12 U.S.C. 1440a.

<sup>12</sup> See 12 U.S.C. 1440a(a).

<sup>13</sup> See 12 U.S.C. 1440a(b)(1).

<sup>14</sup> See 12 U.S.C. 1440a(b)(2).

<sup>15</sup> See 12 U.S.C. 1440a(c), (d).

On September 30, 2010, FHFA published a proposed rule to implement section 20A of the Bank Act by adding to its regulations a new part 1260 to govern the sharing of information among the Banks and the OF.<sup>16</sup> Following the close of the 60-day comment period on November 29, 2010, the agency reviewed and considered all of the comments received and also analyzed more closely a number of issues underlying the rule, including the scope of information to be shared and how that scope might evolve over time. Ultimately, FHFA concluded that a number of revisions to the proposed rule were necessary and that those revisions were significant enough to require the publication of a second proposed rule.

On January 29, 2013, FHFA published a second proposed rule that, again, proposed to implement section 20A by adding a new part 1260 to its regulations.<sup>17</sup> As re-proposed, new part 1260 addressed the procedures through which FHFA would share with all of the Banks non-public financial and supervisory information about each individual Bank, including procedures through which a Bank could request that FHFA withhold from distribution qualifying proprietary information, and set forth requirements intended to prevent or limit the disclosure of that shared information to outside parties. However, in contrast to the first proposed rule, the regulatory text of the second proposed rule did not enumerate the specific categories of information that FHFA would distribute under the rule. Instead, it provided that the Director would identify those categories through an order, which could be updated or superseded from time to time as necessary. In the Supplementary Information to the second proposed rule, FHFA identified and

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<sup>16</sup> See 75 FR 60347 (Sept. 30, 2010).

<sup>17</sup> See 78 FR 6045 (Jan. 29, 2013).

described seven categories of information that it expected to make available under the initial distribution order to be issued under a final rule and requested comments on those categories. FHFA also requested comments on one additional category of information that it was considering including in the initial distribution order.

The 60-day comment period for the second proposed rule ended on April 1, 2013. FHFA received two comment letters in response to the proposed rule, both of which were sent by representatives of individual Banks—specifically, the San Francisco and Topeka Banks. Neither Bank’s letter expressed general support for, or opposition to, the second proposed rule. Instead, each Bank’s letter requested a specific change to the regulatory text. Both Bank’s comments are discussed below in the analysis of the final rule text.

## **II. The Final Rule**

In developing the final rule, FHFA considered the suggestions made in the comment letters, but decided not to adopt those suggestions. The agency ultimately decided to adopt a final rule that is substantially similar to the second proposed rule, but that differs from that proposal in two respects. First, while the second proposed rule provided that the categories of information to be distributed would be identified through an order of the Director or his designee, the final rule provides that these categories will be identified in a written notice to be issued by the agency. Second, revisions have been made to the rule text in several sections to address the possibility that FHFA may in the future determine that certain types of information are best shared directly between the Banks, as opposed to being distributed to the Banks by or through FHFA, which was the only method of distribution contemplated under the second proposed rule. These revisions, as well as a few non-substantive changes to the rule text are discussed below.

FHFA has also decided that the information to be distributed initially under the final rule will consist of the eight categories that were described in the Supplementary Information to the second proposed rule. The initial information sharing notice, which sets forth those categories, is also being published by FHFA in this issue of the Federal Register. Each of the categories of information enumerated in that notice are to be distributed to the Banks and the OF by FHFA. Although additions to the final rule text address the possibility of direct sharing of information between Banks, no such direct sharing will occur initially.

#### A. Section 1260.1—Definitions

Section 1260.1 of the final rule sets forth definitions of the terms “proprietary information” and “non-public information” to be used in part 1260. The definition of “proprietary information” is identical to that set forth in § 1260.1 of the second proposed rule. This meaning of that term is discussed below in the context of the substantive portions of the rule.

The term “non-public information” is defined to have the same meaning as that set forth in 12 CFR 1214.1, which generally defines the term to include “information that FHFA has not made public that is created by, obtained by, or communicated to an FHFA employee in connection with the performance of official duties, regardless of who is in possession of the information.”<sup>18</sup> It replaces the term “unpublished information,” which

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<sup>18</sup> 12 CFR 1214.1. The full definition reads “Non-public information means information that FHFA has not made public that is created by, obtained by, or communicated to an FHFA employee in connection with the performance of official duties, regardless of who is in possession of the information. This includes confidential supervisory information as defined above. It does not include information or documents that FHFA has disclosed under the Freedom of Information Act (5 U.S.C. 552; 12 CFR Part 1202), or Privacy Act of 1974 (5 U.S.C. 552a; 12 CFR Part 1204). It also does not include specific information or documents

had been used in the second proposed rule. At the time the second proposed rule was published, the availability and control of that type of information was governed by 12 CFR part 911, which was a regulation of the former Federal Housing Finance Board that continued in effect after that agency was abolished and replaced by FHFA as regulator of the Banks in 2008. Since the publication of the second proposed rule, FHFA has adopted its own regulation, located at 12 CFR part 1214, to address the same subject matter.<sup>19</sup> Although the agency chose to use the term “non-public information,” as opposed to “unpublished information,” in that rule and defined the term using somewhat different wording than that which was used in part 911, there is no substantive difference in the meaning of the two terms.

#### B. Section 1260.2—Bank Information to be Shared

Under § 1260.2 of the second proposed rule, FHFA would have distributed to each Bank and to the OF the categories of information specified in an order to be issued by the Director of FHFA or by an agency official designated by the Director pursuant to an appropriate delegation of authority. Proposed § 1260.2 would have further required that, prior to issuing or amending such a distribution order, FHFA notify each Bank and the OF of the proposed contents of the new or revised order and allow them a reasonable period within which to comment.

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that were previously disclosed to the public at large or information or documents that are customarily furnished to the public at large in the course of the performance of official FHFA duties, including but not limited to: disclosures made by the Director pursuant to the Enterprise Public Use Database Rule (currently located at 24 CFR subpart F, and any FHFA successor rule); the annual report that FHFA submits to Congress pursuant to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 *et seq.*), press releases, FHFA blank forms, and materials published in the Federal Register.”

<sup>19</sup> See 78 FR 39957 (July 3, 2013).



In the final rule, § 1260.2 has been revised to incorporate the two changes mentioned above: (1) to provide that the categories of information to be distributed are to be identified by means of a written notice to be issued by FHFA, as opposed to an order of the Director or his designee; and (2) to provide for the possibility that certain types of information may be shared directly between the Banks, as opposed to being distributed only by or through FHFA. In addition, the revised material in § 1260.2 has now been divided into three subsections.

Final § 1260.2(a) provides that “FHFA shall distribute to each Bank and to the Office of Finance, or shall require each Bank to distribute directly to each other Bank and the Office of Finance, such categories of financial and supervisory information regarding each Bank and the Bank system as it determines to be appropriate.” Final § 1260.2(b) requires that FHFA prepare and issue to each Bank and the OF a notice setting forth the categories of information that it will distribute, or that the Banks will share directly, under the rule. It also requires that FHFA review the information sharing notice on a periodic basis, and add or delete items as necessary to ensure that the information sharing under part 1260 continues to fulfill the purposes of section 20A of the Bank Act. As was the case with the distribution order contemplated under the second proposed rule, final § 1260.2(b) also requires that, prior to issuing a new or revised information sharing notice, FHFA notify each Bank and the OF of the proposed contents of the new or revised notice and allow them a reasonable period within which to comment. Finally, § 1260.2(c) of the final rule provides that the Director of FHFA or his designee may issue any orders that are necessary to effect the distribution of the information set forth in the information sharing notice and otherwise to carry out the provisions of part 1260.

Shared information to be specified in notice, not order

The distribution order referred to in § 1260.2 of the second proposed rule would not have actually ordered anyone to do anything, but would have merely informed the Banks and the OF of the information that FHFA intended to share and, in some cases, of the time within which a Bank must file a request to hold proprietary information, so in the final rule FHFA has restyled that order as a notice. In some future cases, the agency may find it necessary to issue an order to require the Banks to share certain information directly. Thus, despite the fact that the Director of FHFA always has the power to issue orders to govern matters within his or her authority, § 1260.2(c) has been included to make clear that the Director may issue any orders that are necessary to effect the preparation and distribution of particular items and that these orders are to be separate from the information sharing notice.

Direct sharing of information between Banks.

In drafting both the first and second proposed rules, FHFA contemplated that it alone would act as the clearinghouse for all required sharing of information under section 20A of the Bank Act. Accordingly, in the second proposed rule, § 1260.2 referred only to the distribution of information by FHFA, and the rule did not otherwise address the possibility that FHFA might require a Bank to share information directly with the other Banks and the OF. FHFA still anticipates that it will serve as the clearinghouse for most of the information sharing under the final rule, and will do so for all of the categories of information enumerated in the initial information sharing notice. However, in some circumstances, direct sharing of information between the Banks may be the most timely, efficient, or secure approach. Therefore, upon further consideration, FHFA has decided

to provide in the final rule for the option of direct sharing so as not to limit the agency's ability to implement the most appropriate method of information sharing in any particular case.

Although the second proposed rule did not address the direct sharing of information between Banks, the rule would not have prohibited such direct sharing. In the Supplementary Information to the second proposed rule, FHFA declined a commenter's request to include in the rule text an explicit provision stating that part 1260 governs the entirety of a Bank's right to receive shared information under section 20A and that no Bank is permitted to receive such information unilaterally from FHFA or another Bank. The agency explained that its regulations already prohibit a Bank from disclosing non-public information without prior written authorization from FHFA and that it wished to preserve its ability to provide written authorization for the disclosure of such information as circumstances warrant. FHFA further explained that there is no basis upon which it may generally prohibit Banks from sharing financial information that does not qualify as non-public information under the regulations, and that it did not want to discourage the voluntary sharing of information among Banks that already occurs.

To be clear, this final rule is intended to govern only mandatory direct sharing of information between Banks as set forth in an information sharing notice issued under § 1260.2 of the rule; voluntary sharing of information between Banks is not subject to the requirements or procedural protections of part 1260.

Types of information sharing addressed by the rule.

In keeping with the apparent intent behind section 20A of the Bank Act, §1260.2 limits the type of information that may be shared under the provisions of the rule to

financial and supervisory information regarding the Banks, either individually or collectively. Even before the enactment of section 20A in 2008, a great deal of financial information about the Banks, both individually and collectively, was already being made available to the public on an ongoing basis both by FHFA and by the Banks themselves (for example, through the Banks' SEC filings). FHFA believes that section 20A was intended primarily to foster the sharing among the Banks of financial and supervisory information that was not already available to them or to the public-at-large under any existing statutory authority. The provision of Section 20A that authorizes FHFA to make such information available to the Banks without negating any privilege that may be attached to it, subject to the required procedural protections for information that a Bank claims to be proprietary, supports that interpretation. Part 1260 is intended to implement section 20A by establishing a process through which each Bank may gain access to financial and supervisory information about the other Banks that is not available to the wider public. Its requirements do not apply to the distribution of information that has already been made available to the public, or that is available to the public upon request.

Issuance or revision of an information sharing notice.

Section 1260.2(b) requires that, prior to issuing a new or revised information sharing notice, FHFA notify each Bank and the OF of the proposed contents of the notice and allow them a reasonable period within which to comment. The Supplementary Information to the second proposed rule enumerated and discussed the categories of information that FHFA was considering to include in the initial distribution order (as it was then styled) so as to allow the Banks and the OF the fullest opportunity to consider and comment upon them, as well as to provide the proper context in which to assess the

rule itself. However, the rule does not require that the notice appear in the Federal Register or meet any of the other notice-and-comment requirements associated with a rulemaking under the Administrative Procedure Act, and the agency anticipates that it will typically use a less formal notice-and-comment process prior to issuing a new or revised information sharing notice in the future.

FHFA enumerated and discussed in the second proposed rule seven categories of information it expected to share initially under the rule, and requested comments on whether an eighth category of information should also be included. As discussed below, the information to be shared initially under the rule includes all eight of the categories that were discussed in the second proposed rule, and does not include any categories of information that were not discussed in that rule. Accordingly, FHFA considers the notice and opportunity to comment provided by the second proposed rule to have fulfilled the requirements of § 1260.2(b) and, thus, it is not providing the Banks with any further opportunity to comment on the contents of the initial information sharing notice.

Information to be shared initially under the rule.

The initial information sharing notice provides for the sharing of the following categories of information under part 1260:

(1) Information submitted by a Bank to FHFA's call report system (CRS) electronic database, excluding Bank membership information;<sup>20</sup>

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<sup>20</sup> The Banks are not permitted to access detailed information about other Banks' members that is contained in the CRS database because FHFA considers this to be proprietary information.

(2) Information about each Bank, and the Banks collectively, that is presented in FHFA's semi-annual "Profile of the Federal Home Loan Bank System" report prepared by FHFA's Division of Bank Regulation (DBR);<sup>21</sup>

(3) Information about each Bank, and the Banks collectively, that is contained in the weekly report on Bank liquidity prepared by DBR;

(4) Information about each Bank, and the Banks collectively, that is contained in the quarterly report on Bank membership prepared by DBR;

(5) Information about each Bank, and the Banks collectively, that is contained in the weekly report on the Banks' unsecured credit exposure prepared by DBR;

(6) A quarterly statement, prepared by FHFA, indicating whether each Bank has timely filed with FHFA the quarterly liquidity certification required under 12 CFR 1270.10(b)(1);

(7) A statement, to be prepared by FHFA as circumstances warrant, identifying any Bank that has notified FHFA pursuant to 12 CFR 1270.10(b)(2) of any actual or anticipated liquidity problems and describing the nature of the liquidity problems; and

(8) Beginning with the calendar year 2014 Bank examination cycle, information contained in the "Summary and Conclusions" portion of each Bank's report of examination.

Categories (1) through (4) above are already made available to the Banks. Their inclusion in the information sharing notice is intended merely to bring their distribution

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<sup>21</sup> DBR also prepares more detailed semi-annual profiles of the individual Banks which currently are shared only with the subject Bank and not with other Banks or the OF. Because these individual Bank profiles often contain proprietary information regarding a Bank's members, as well as assessments based upon detailed information from the Bank's report of examination, FHFA does not intend to share that information at this time.

within the purview of part 1260. Categories (5) through (8) will be distributed for the first time under this final rule and the initial information sharing notice. Each of these categories of information except for the weekly report on the Banks' unsecured credit exposure described in category (5) was discussed in the second proposed rule as a category that was likely to be included in the initial distribution order. The second proposed rule discussed the report on the Banks' unsecured credit exposure (which is currently used only internally at FHFA) as a category of information that FHFA might possibly include in the distribution order and requested comments on whether it would be useful for the Banks to receive the information contained in that report. Although the agency received no comments on that issue, it has determined that regular distribution of the information contained in the report will advance the purposes of section 20A of the Bank Act and, accordingly, has included that category of information in the initial information sharing notice.

In response to the second proposed rule, FHFA received only one comment letter—from the Topeka Bank—on the categories of information proposed to be shared initially. In its comment letter, the Bank opposed FHFA's decision to share only the Summary and Conclusions portion of each Bank's report of examination and stated that the initial distribution order should provide for the sharing of each Bank's entire report of examination, except for the "Management Discussion" portion. The Bank expressed its view that FHFA could best enable each Bank to assess the likelihood that it may be required to make payments on behalf of another Bank under the joint and several liability on the Banks' consolidated obligations by providing the full reports of examination.

The agency has decided against taking this approach. The first proposed rule contemplated that FHFA would routinely distribute each Bank's report of examination in its entirety. In the second proposed rule, FHFA explained that it had carefully weighed the Banks' need to receive information sufficient to assess the financial condition of the other Banks and to make legal disclosures regarding their potential joint and several liability against the possibility that the distribution of full reports of examination could hinder the candid communication between Bank employees and FHFA examiners that is critical to the examination process, and that it planned to distribute only the material that is contained in what is currently referred to as the "Summary and Conclusions" section of each Bank's report of examination under the initial distribution order. This material includes only: (i) the Bank's composite rating and component ratings for the current and prior examinations; (ii) a summary of the basis for the current composite rating (including any component that is a significant factor in the composite rating) and any changes to the composite or component ratings since the last examination; and (iii) the conclusion regarding the overall condition and practices of the Bank and the analysis used to reach that conclusion. The Summary and Conclusions section includes no detailed discussion or analysis of a Bank's component examination ratings and no discussion or analysis of "matters requiring attention" of the Bank's board of directors.<sup>22</sup>

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<sup>22</sup> During 2013, FHFA has been developing a new FHFA Examination Manual that, when completed, will establish a common examination program for both the Banks and the Enterprises (Fannie Mae and Freddie Mac). As each module of the new FHFA Examination Manual has been finalized, it has superseded the existing Federal Home Loan Bank Examination Manual with respect to the particular subject matter addressed in that module. Because FHFA has not yet finalized a new FHFA Examination Manual module to address the required contents and structure of a report of examination, including the material to be set forth in the Summary and Conclusions section of the report, the old Bank Examination Manual continues to govern those issues. The relevant section of the Bank Examination Manual can be found at <http://www.fhfa.gov/webfiles/2658/5ROE.1.pdf>. When FHFA finalizes a new FHFA Examination Manual



FHFA agrees that the additional information that a Bank would receive as part of a full report of examination would provide it with more complete information that could be used to assess its exposure to joint and several liability. However, in the agency's assessment, the Summary and Conclusions section of a Bank's report of examination will sufficiently identify any significant issues relating to the Bank's financial condition and performance that might possibly implicate the joint and several liability of the other Banks. The marginal benefit of receiving the more detailed supervisory information that is contained in the remainder of a report of examination is outweighed by the negative effects that the sharing of such information, and the knowledge that such information would be shared, could have on the Bank examination process.

In further support of its position, the Topeka Bank asserted that the detailed information contained in a full report of examination could be used to assess factors and trends that might affect a Bank's funding, and to gain insight into ways of dealing with issues and risks that are common among the Banks. While the sharing of the full reports of examination may in some cases provide those benefits, they are at best only tangentially related to the purpose of information sharing under section 20A, which is to "enable each [Bank] to evaluate the financial condition of . . . the other [Banks] individually and the [Bank] System" as a whole.<sup>23</sup> Accordingly, FHFA does not view this argument as persuasive as to the portions of the reports of examination that should be shared pursuant to part 1260.

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module addressing those issues, it will revise the paragraph of the information sharing notice referring to the Summary and Conclusions section of the Banks' reports of examination if necessary so that the text continues to refer to the the specific types of information described above.

<sup>23</sup> See 12 U.S.C. 1440a(a).

### C. Section 1260.3—Requests to Withhold Proprietary Information

Section 1260.3 of the final rule implements section 20A(b)(2) of the Bank Act, which permits a Bank to request that the Director of FHFA determine that particular information otherwise subject to distribution under section 20A “is proprietary and that the public interest requires that such information not be shared.”<sup>24</sup>

Section 1260.3(a) provides that a Bank may request in writing that FHFA withhold from distribution, or determine that the Bank may withhold from distribution, particular information relating to the Bank on the grounds that it is proprietary information and the public interest requires that it not be shared. Section 1260.3(a) also requires that, in order for such a request to be considered by FHFA, it must identify the particular information the Bank believes should be withheld and provide support for the assertions that it is proprietary information and that withholding the information from the other Banks and the OF is necessary to protect the public interest. Section 1260.1 of the final rule defines the term “proprietary information” to mean “trade secrets, or privileged or confidential commercial or financial information that, if shared among the Banks and the Office of Finance as provided under this part, would likely cause substantial competitive harm to the Bank to which the information pertains.” Because, in addition to demonstrating that the information in question qualifies as “proprietary information,” a Bank must meet the “public interest” element of the withholding test, it is possible that FHFA may find it necessary to distribute information that qualifies as “proprietary”

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<sup>24</sup> See 12 U.S.C. 1440a(b)(2).

where the distribution of that information to the Banks and the OF would not be harmful to the public interest.

Substantively, final § 1260.3(a) is identical to the version that appeared in the second proposed rule. However, in this final rule, the wording of § 1260.3(a) has been revised slightly to make clear that a Bank that is required to share particular information directly with other Banks may request permission from FHFA to withhold information that meets the criteria set forth in this subsection from distribution.

Section 1260.3(b) addresses the required timing of requests from the Banks to withhold proprietary information. Paragraph (b)(1) establishes general rules for requests relating to information submitted by a Bank to FHFA (such as call report data), information created by FHFA (such as reports of examination), and information that a Bank is required to share directly with the other Banks and the OF. Paragraph (b)(2) provides an exception to the general rules, by allowing the Director to establish different timeframes for particular categories of information in the information sharing notice issued under § 1260.2(b). For information that a Bank submits to FHFA, subparagraph (b)(1)(i) provides that the agency will consider only requests that are received prior to, or simultaneously with, the Bank's submission of the information to FHFA. For information to be distributed by FHFA, other than that which is submitted to FHFA by the Banks themselves, subparagraph (b)(1)(ii) permits each Bank ten business days after being provided a copy of the information within which to review that information for proprietary material and to deliver to FHFA a request to withhold.

Subparagraphs (b)(1)(i) and (ii) are identical to the versions that appeared in the second proposed rule. Subparagraph (b)(1)(iii) has been added to the final rule to address

the timing of requests to withhold information that a Bank is required to distribute directly to the other Banks and the OF. It requires a Bank to file a request to withhold no later than ten business days prior to the date on which the Bank would otherwise be required to distribute the information.

As mentioned, paragraph (b)(2) of § 1260.3 would allow FHFA, as part of a information sharing notice issued under § 1260.2(b), to establish requirements for the timing of requests to withhold for any category of information enumerated in that notice. The default deadlines for submitting a request to withhold that are set forth in § 1260.3(b)(1) may be inappropriate in particular cases, and § 1260.3(b)(2) is intended to preserve FHFA's ability to adjust those deadlines in cases where the facts require a different timetable. It requires that, in establishing any alternate timing requirements, the Director or his designee must consider the volume and complexity of the information to be reviewed, the Bank's existing familiarity with the information, the frequency of submission or distribution of the information, the likelihood that the information will contain proprietary information, and the effect that any delay in the distribution of the information would have on the fulfillment of the purposes of section 20A(a) of the Bank Act. The initial information sharing notice contains no special requirements as to the timing of requests to withhold. Therefore, the general requirements of § 1260.3(b)(1) will apply to the timing of requests to withhold proprietary information that falls within the categories of information enumerated in the notice.

Section 1260.3(c) of the final rule requires that, after receiving a written request that meets the form and timing requirements of paragraphs (a) and (b) of § 1260.3, the Director or his designee promptly determine whether to withhold any information from

distribution, or permit a Bank to withhold information that is otherwise required to be shared directly, and provides that the determination shall be final. Paragraph (c) also requires that FHFA notify the affected Bank of its determination, and prohibits it from distributing the information that is the subject of the request until it has provided the required notice to the Bank. Substantively, final § 1260.3(c) is identical to the version that appeared in the second proposed rule, but the wording has been revised slightly to make clear that the provision applies to the direct sharing of information among Banks, as well as to the distribution of information by FHFA.

In its comment letter, the San Francisco Bank supported the requirement of § 1260.3(c) that FHFA provide notice to the requesting Bank before it distributes any information that is the subject of a request to withhold. However, the Bank requested that the final rule require specifically that FHFA notify the requesting Bank at least four business days prior to distributing the information. The Bank explained that this would allow the Bank “sufficient time to prepare any disclosures required by the federal securities laws or contractual requirements.”

FHFA has decided not to add this, or any specific, requirement as to the timing of the notice to the final rule. The agency is cognizant of the need to allow a Bank sufficient time to take any necessary measures prior to the disclosure of information that is the subject of a request to withhold—indeed, that is a purpose of the notice requirement. In many cases, allowing the affected Bank four days’ advance notice will be appropriate. In other cases—for example, if the affected Bank is experiencing severe liquidity problems—the information could be of little or no use if it were to be withheld from distribution for an additional four days. In light of this, FHFA has concluded that

the better approach is to address such situations on a case-by-case basis, balancing the extent to which the usefulness of the information would be compromised by delaying its disclosure against the legal or contractual requirements with which the Bank must comply in connection with the disclosure.

#### D. Section 1260.4—Timing and Form of Information Distribution

Section 1260.4 of the final rule governs the timing and form of the distribution of information under the rule. Section 1260.4(a) provides that FHFA may distribute information to the other Banks and the OF after the expiration of the applicable time period for requesting that FHFA withhold proprietary information, unless the affected Bank has actually submitted such a request. It further provides that, if a Bank has filed a request to withhold information, FHFA may not distribute the information that is the subject of the request until after the Director or his designee has acted on the request and has provided the affected Bank with notice of the decision as required under § 1260.3(c). Subsequently, FHFA may distribute the subject information in conformity with that decision.

Section 1260.4(b) has been added to the final rule to address the timing of the distribution of information that a Bank is required to share directly with the other Banks and the OF. It requires a Bank to distribute the information at the time specified in the information sharing notice unless it has submitted a proper request to withhold within the time period specified under § 1260.3(b)(1)(iii). It further provides that, if a Bank has filed a request to withhold information, it is not required to distribute the information that is the subject of the request until after the Director or his designee has acted on the request and has provided the affected Bank with notice of the decision as required under

§ 1260.3(c). Subsequently, the Bank must distribute or withhold the subject information in conformity with that decision.

Section 1260.4(c), which was designated as § 1260.4(b) in the second proposed rule, permits FHFA to distribute information, or to require a Bank to distribute information, in either tangible or electronic form, as it deems appropriate in each particular case. The wording of this provision has been revised slightly in the final rule to make clear that it applies to the direct sharing of information between Banks, as well as to the distribution of information by FHFA.

#### E. Section 1260.5—Control and Disclosure of Shared Information

Section 1260.5 of the final rule sets forth requirements that each Bank must follow with respect to the control of information about other Banks that it receives under the rule. Section 1260.5(a) provides that the sharing of information under part 1260 does not constitute a waiver by FHFA of any privilege, or its right to control, supervise, or impose limitations on the subsequent use and disclosure of any information concerning a Bank. It also provides that, to the extent that any information provided to a Bank or the OF under the rule qualifies as “non-public information” under 12 CFR part 1214 (which is discussed above in the analysis of § 1260.1), that information will continue to qualify as such and will continue to be subject to the restrictions on the disclosure of such information set forth in part 1214.

In addition, § 1260.5(a) provides that a Bank may use and disclose in its SEC disclosure documents non-public information regarding other Banks it receives under the rule, provided that the disclosure is limited to a recital of the factual content of the

underlying information and the Bank meets the requirements regarding the disclosure of information in SEC filings that are set out in § 1260.5(b).<sup>25</sup>

Section 1260.5(b) permits a Bank to disclose non-public information received under the rule in its SEC disclosure documents provided that its determination that such disclosure is required under applicable provisions of the federal securities laws has been made in good faith, and the Bank provides to FHFA and to the Bank to which the information pertains prior notice of the content and the anticipated timing of the disclosure.

Section 1260.5(c) provides that a Bank may use non-public information received under the rule only for the purposes described in section 20A(a) of the Bank Act—that is, to evaluate the financial condition of one or more other Banks and to comply with its obligations under the 1934 Act. It also prohibits the disclosure of any non-public information received under part 1260, except as otherwise provided in the rule (for example, in the case of a disclosure made under the federal securities laws pursuant to § 1260.5(a) and (b)). Section 1260.5(c) further requires that each Bank and the OF implement policies and procedures to prevent the improper disclosure of, and to limit the access of its personnel to, such information. These policies and procedures must be no less stringent than those that apply to the entity’s own confidential and supervisory information. As with other internal controls, these procedures and their implementation will be subject to FHFA scrutiny as part of the Bank examination process.

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<sup>25</sup> This provision parallels the requirements that apply to a Bank’s disclosure in SEC filings of information contained in its own report of examination. See Federal Housing Finance Board Advisory Bulletin 2006-AB-03 (July 18, 2006).



In the second proposed rule, the second sentence of § 1260.5(c) provided, “Except as otherwise provided in this part, neither the Office of Finance, nor any Bank, nor any officer, director or employee thereof, may disclose or permit the use or disclosure of any unpublished information regarding another Bank or the Office of Finance, received pursuant to this part, in any manner or for any purpose.” In this final rule, the reference in that sentence to “information regarding . . . the Office of Finance, received pursuant to [part 1260]” has been removed and, accordingly, the sentence now refers only to “information regarding another Bank received pursuant to [part 1260].” This change has been made in recognition of the fact that, as was the case with the second proposed rule, the final rule does not provide for any formal sharing of information pertaining to the OF because all twelve Bank presidents are members of the OF’s board of directors and, therefore, already have access to its report of examination and other financial information. Section 1260.5(d) permits each Bank’s president to share information regarding the OF received in his or her capacity as a member of the OF’s board with the boards of directors and appropriate staff of his or her Bank, subject to the restrictions on disclosure and adoption of policies and procedures required under the rule.

### **III. Consideration of Differences Between the Banks and the Enterprises**

Section 1313(f) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 requires the Director of FHFA, when promulgating regulations relating to the Banks, to consider the differences between the Banks and the Enterprises (Fannie Mae and Freddie Mac) as they relate to: the Banks’ cooperative ownership structure; the mission of providing liquidity to members; their affordable housing and community development mission; their capital structure; and their joint and several

liability on consolidated obligations.<sup>26</sup> The Director also may consider any other differences that are deemed appropriate. In preparing this final rule, FHFA considered the differences between the Banks and the Enterprises as they relate to the above factors, and determined that the rule is appropriate. No commenters raised any issues relating to this statutory requirement, as it applied to the second proposed rule.

#### **IV. Paperwork Reduction Act**

This final rule does not contain any collections of information pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). Therefore, FHFA has not submitted any information to the Office of Management and Budget for review.

#### **V. Regulatory Flexibility Act**

This final rule applies only to the Banks, which do not come within the meaning of small entities as defined in the Regulatory Flexibility Act (RFA). See 5 U.S.C. 601(6). Therefore, in accordance with section 605(b) of the RFA, FHFA certifies that this final rule will not have significant economic impact on a substantial number of small entities.

#### **List of Subjects in 12 CFR Part 1260**

Confidential business information, Federal home loan banks, Reporting and recordkeeping requirements.

#### **Authority and Issuance**

Accordingly, for the reasons stated in the Supplementary Information and under the authority of 12 U.S.C. 4526, the Federal Housing Finance Agency hereby amends

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<sup>26</sup> See 12 U.S.C. 4513(f).

chapter XII of title 12 of the Code of Federal Regulations by adding new part 1260 to subchapter D to read as follows:

**PART 1260—SHARING OF INFORMATION AMONG FEDERAL HOME LOAN  
BANKS**

Sec.

1260.1 Definitions.

1260.2 Bank information to be shared.

1260.3 Requests to withhold proprietary information.

1260.4 Timing and form of information distribution.

1260.5 Control and disclosure of shared information.

**Authority:** 12 U.S.C. 1440a, 4511 and 4513.

**§ 1260.1 Definitions.**

As used in this part:

Non-public information has the meaning set forth in § 1214.1 of this chapter.

Proprietary information means trade secrets, or privileged or confidential commercial or financial information that, if shared among the Banks and the Office of Finance as provided under this part, would likely cause substantial competitive harm to the Bank to which the information pertains.

**§ 1260.2 Bank information to be shared.**

(a) General. In order to enable each Bank to evaluate the financial condition of any one or more of the other Banks and the Bank System, FHFA shall distribute to each Bank and to the Office of Finance, or shall require each Bank to distribute directly to each other Bank and the Office of Finance, such categories of financial and supervisory information regarding each Bank and the Bank system as it determines to be appropriate, subject to the requirements of this part.

(b) Notice. FHFA shall prepare and issue to each Bank and the Office of Finance a notice setting forth the categories of information to be distributed, which it shall review from time to time and revise as necessary to ensure that the information distributed remains useful to the Banks in evaluating the financial strength of the other Banks and the Bank System. Prior to issuing a new or revised notice, FHFA shall notify each Bank and the Office of Finance of its proposed contents and allow them a reasonable period within which to comment.

(c) Director's orders. The Director or his designee may issue such orders as are necessary to effect the distribution of the information set forth in the notice issued under paragraph (b) of this section and to carry out the provisions of this part.

### **§ 1260.3 Requests to withhold proprietary information.**

(a) General. A Bank may request in writing that FHFA withhold from distribution, or determine that the Bank may withhold from distribution, particular information relating to the Bank that may otherwise be subject to distribution under § 1260.2 on the basis that it is proprietary information and the public interest requires that it not be shared. Any such request shall identify the particular information the Bank believes should not be distributed and provide support for the assertions that it is proprietary information and that withholding it from the other Banks and the Office of Finance is necessary to protect the public interest.

(b) Timing of requests.—(1) General. Unless otherwise specified as described in paragraph (b)(2) of this section, the period within which a Bank may make a request to withhold proprietary information under paragraph (a) of this section shall be as follows:

(i) For information that a Bank submits to FHFA, the request shall be delivered to FHFA no later than the time at which the Bank submits the subject information to FHFA.

(ii) For information that FHFA creates (not including compilations of data submitted by the Banks), prior to distributing any information relating to a particular Bank, FHFA shall provide that Bank with a copy of the information to be distributed, after which the Bank shall have ten (10) business days within which to deliver the request to FHFA.

(iii) For information that a Bank is required to distribute directly to the other Banks and the Office of Finance, the request shall be delivered to FHFA no later than ten (10) business days prior to the date on which the Bank would otherwise be required to distribute the information.

(2) As otherwise specified by FHFA. Any notice issued by FHFA under § 1260.2(b) may establish requirements for the timing of requests to withhold proprietary information that are different from those specified under paragraph (b)(1) of this section for any category of information to be distributed thereunder. In establishing such requirements, FHFA shall give due regard to the volume and complexity of the information to be reviewed, the Bank's existing familiarity with the information, the frequency of submission or distribution of the information, the likelihood that the information will contain proprietary information, and the effect that any delay in the distribution of the information would have on the fulfillment of the purposes of section 20A(a) of the Bank Act.

(c) Determination and notice by FHFA. After receiving a written request that meets the requirements of paragraphs (a) and (b) of this section, the Director or his

designee shall promptly determine whether FHFA will, or the Bank may, withhold any information from distribution pursuant to the request, which determination shall be final. FHFA shall promptly notify the affected Bank of that determination and shall not distribute any information that is the subject of the request until it has provided the required notice to the Bank.

**§ 1260.4 Timing and form of information distribution.**

(a) Timing of distribution by FHFA. FHFA may distribute information as provided in the notice issued under § 1260.2(b) after the expiration of the applicable time period specified in § 1260.3(b) unless, within that time period, the affected Bank has filed with FHFA a written request to withhold particular proprietary information that meets the requirements of § 1260.3(a). When a Bank has filed such a request, FHFA shall not distribute the information that is the subject of the request until the Director or his designee has made the determination and provided the notice required by § 1260.3(c) and shall distribute or withhold the subject information in conformity with that determination.

(b) Timing of distribution by Banks. A Bank that is required to distribute information directly to the other Banks and the Office of Finance shall distribute that information at the time specified in the notice issued under § 1260.2(b) unless, within the time period specified in § 1260.3(b)(1)(iii), the Bank has submitted to FHFA a request to withhold particular proprietary information that meets the requirements of § 1260.3(a). If the Bank has filed such a request, it need not distribute the information that is the subject of the request until the Director or his designee has made the determination and provided the notice required by § 1260.3(c). Thereafter, the Bank shall distribute or withhold the subject information in conformity with that determination.

(c) Form. FHFA may distribute information, or require a Bank to distribute information, under this part in either tangible or electronic form, as it deems appropriate.

**§ 1260.5 Control and disclosure of shared information.**

(a) No waiver of privilege. The release of information under this part does not constitute a waiver by FHFA of any privilege, or of its right to control, supervise or impose limitations on the subsequent use and disclosure of any information concerning a Bank. To the extent that any information provided to a Bank or the Office of Finance pursuant to this part qualifies as non-public information under part 1214 of this chapter, that information shall continue to qualify as such and shall continue to be subject to the restrictions on disclosure set forth in part 1214, provided that a Bank shall not be deemed to have violated any provision of § 1214.3 of this chapter by disclosing in its filings with the SEC non-public information about another Bank that was obtained pursuant to this part if the disclosure is limited to a recital of the relevant factual content of the underlying information and the Bank has provided the notice required by paragraph (b) of this section.

(b) Disclosures under the Federal securities laws. If a Bank determines in good faith that it is required by any applicable provision of the 1934 Act or of 17 CFR chapter II to disclose non-public information relating to another Bank that it has received pursuant to this part, it shall provide to FHFA and to the Bank to which the information pertains prior written notice of such determination and of the content and anticipated timing of the disclosure, which notice shall be provided as far in advance of the anticipated disclosure as is feasible under the circumstances.

(c) Safeguarding of information. A Bank may use non-public information distributed pursuant to this part only for the purposes described in section 20A(a) of the Bank Act. Except as otherwise provided in this part, neither the Office of Finance, nor any Bank, nor any officer, director or employee thereof, may disclose or permit the use or disclosure of any non-public information regarding another Bank received pursuant to this part in any manner or for any purpose. Each Bank and the Office of Finance shall implement policies and procedures to prevent the improper disclosure of such information and to limit the access of its personnel to such information, which policies and procedures shall be no less stringent than those that apply to the entity's own confidential and supervisory information.

(d) Information regarding the Office of Finance. A Bank president that receives any information regarding the Office of Finance in his or her capacity as a member of the board of directors of the Office of Finance may share the information with the board of directors of the Bank at which he or she is employed, as well as with the appropriate officers and employees of the Bank, subject to the limitations of this part.

Dated: November 22, 2013.

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Edward J. DeMarco,  
Acting Director, Federal Housing Finance Agency.

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